YEW AH BAH

v.

YEANG KING MUN

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 22-485-89]
24 JANUARY 1992

CONTRACT: *Sale and purchase of land - Whether option validly exercised - Whether binding contract executed - Date of payment of 10% deposit ambiguous - Whether material - Notice pursuant to the option clause - Option whether properly given - Or whether note simpliciter - Triable issue.*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction from disposing of real property - Whether non-disclosure of material facts at the time of ex parte application - Material to set aside said injunction - Copy of the option document exhibited at the Court - But draft sale and purchase agreement not exhibited - The Court not in a position to see the difference between the terms of said respective documents enclosed at the material time when the interlocutory injunction is granted.*

On 13 November 1989, the plaintiff commenced this action against the defendant to purchase an apartment at a purchase price of RM310,000. It was alleged that the defendant refused and/or neglected to execute a sale and purchase agreement. The plaintiff therefore prayed for an order that the defendant execute the sale and purchase agreement, specific performance, damages and costs.

On 23 April 1990 the plaintiff obtained an *ex parte* order to restrain the defendant from "disposing of" the said apartment until the disposal of the suit. Fourteen months later upon the grant of the said injunction, the defendant filed a SIC for an order that the interim injunction be dissolved and discharged and consequential orders.

On 6 December 1991 the Court allowed the application and also directed that the defendant deposit RM140,000 in an interest bearing deposit account at a bank to be agreed by both parties with the solicitors for both parties as co-signatories until the disposal of the suit. The plaintiff appealed.

The matter before the Court was whether the 10% deposit must be paid first before a binding contract is formed. The plaintiff's pleadings also disclosed that the 10% deposit would be paid upon the execution of the sale and purchase agreement.

Held:

[1] The point is that, by his own pleading, the plaintiff would not have paid the 10% deposit until today, because until today, the sale and purchase agreement had not been executed. Indeed, nowhere in the statement of claim did the plaintiff say that he had paid the 10% deposit. That being so, it cannot be said that there was a binding contract between the plaintiff and the defendant as the option clearly states that the 10% must be paid first before a binding contract is formed. This clearly means that the plaintiff has no cause of action against the defendant.

[2] One point to note here is that even if that letter is a notice pursuant to clause 7 of the option, then it appears that notice was given before the contract was entered. Furthermore the wording of the note is not in the form of a notice to the defendant. It is a note simpliciter. This is an issue to be tried.

[3] The other point raised is non-disclosure of material facts. It is trite law that in an *ex parte* application for an injunction, the applicant must give a full, frank and honest disclosure of all material facts. The main argument raised here is that the draft sale and purchase agreement was not exhibited when the plaintiff applied for the *ex parte* order. A copy of the option was enclosed. It was argued that as a result of the failure, the Court was not in a position to see the difference between the terms of agreement and the terms of the option and in particular with regard to vacant possession.

[Order in terms allowed.]

For the plaintiff/respondent - Sarasvathy; M/s. Devan Hussin & Co.
For the defendant/applicant - C.L. Wong; M/s. Skrine & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

On 13 November 1989, the plaintiff commenced this action against the defendant. The plaintiff claimed that on 29 April 1989 he had entered into a contract with the defendant through the defendant's agent (New Bob Realty Sdn. Bhd.) to purchase an apartment at a purchase price of RM310,000. However, the defendant refused and/or neglected to execute a sale and purchase agreement. The plaintiff, therefore, prayed for an order that the defendant execute the sale and purchase agreement, specific performance, damages and costs.

On 23 April 1990, that is about five months later, the plaintiff filed an *ex parte* summons-in-chambers (encl. 6) asking for an order to restrain the defendant from "disposing of" the said apartment until the disposal of the suit. On 23 April 1990 my predecessor Wan Adnan J made an order "that the defendant be restrained by way of an interlocutory injunction from disposing of the apartment ... until further order and from parting with the same in any way whatsoever ...".

On 1 June 1991, that is some fourteen months after the interim injunction was given, the defendant filed a summons in chambers for an order that the interim injunction be dissolved and discharged and consequential orders.

On 6 December 1991 I allowed the application, prayers (a) and (b) of encl. 21. I also directed that the defendant deposit RM140,000 in an interest bearing deposit account at a bank to be agreed by both parties with the solicitors for both parties as co-signatories, until the disposal of the suit.

The plaintiff appealed:

Learned Counsel for the defendant first argued that plaintiff had no arguable case. First, he said that New Bob (defendant's agent) had not validly exercised the option because:

(a) the defendant did not receive an A.R. Registered letter from New Bob (his agent) that a deposit of 10% of the purchase price had been paid by the plaintiff;

(b) the 10% which was paid to New Bob on 24 April 1989 was returned to the **plaintiff's own** solicitor on 2 May 1989;

(c) contrary to Clause 2 of the written option, it was sold "free from all encumbrances and with vacant possession".

Before dealing with these points there is one matter which is so glaring which I think I should deal with. This is whether the option could be said to have been exercised at all, in accordance with the terms of the option. Clause 7 of the option reads:

> This option shall be validly exercised by you or your nominee by A.R. registered letter to me/us confirming that a sum equal to ten percent (10%) deposit of the price has been paid by the purchaser. Thereupon there shall be a binding contract for the sale and purchase of the above property and the balance shall be paid within three (3) months upon the date of signing of the sale and purchase agreement.

It should be noted that it is a precondition before a binding contract comes into being that the 10% deposit must be paid first.

However, para. 5 of the statement of claim reads:

> 5. On or about 29 April 1989 the plaintiff entered into a contract of sale and purchase of the said apartment with the defendant through the defendant's said agent on the following terms and conditions:
>
> (1) purchase price: RM310,000
>
> (2) **10% deposit to be paid upon execution of sale and purchase agreement**
>
> (3) balance purchase price to be paid within four (4) months of execution of the sale and purchase agreement.

It should be noted that by his own pleading, the plaintiff said that the 10% deposit would be paid upon the execution of the sale and purchase agreement. In para. 10 of the statement of claim the plaintiff said:

> 10. The plaintiff avers that in breach of the said contract of sale and purchase of the said apartment the defendant has to-date failed, refused and/or neglected to execute the said sale and purchase agreement.

The plaintiff then went on to pray, *inter alia*, for:

(1) an order that the defendant do forthwith execute the sale and purchase agreement in respect of the said apartment;

(2) specific performance of the sale and purchase agreement in respect of the apartment by the defendant;

(3) damages;

(4) costs;

(5) such further or other orders and/or relief as this Honourable Court deems fit.

The point is that, by his own pleading, the plaintiff would not have paid the 10% deposit until today, because until today, the sale and purchase agreement has not been executed. Indeed, nowhere in the statement of claim did the plaintiff say that he had paid the 10% deposit. That being so, it cannot be said that there was a binding contract between the plaintiff and the defendant as the option clearly states that the 10% must be paid first before a binding contract is formed. This clearly means that that the plaintiff has no cause of action against the defendant.

However, in his affidavit in support of the summons in chambers, the plaintiff said that he had paid the deposit of 10% to New Bob, but he did not say when. But he went on to say that on 29 April 1989, New Bob forwarded the deposit to the defendant's solicitors.

This is clearly a departure from what is stated in the statement of claim, which the plaintiff should not be allowed to do.

Be that as it may, I fail to understand why the deposit, even if paid to New Bob, was returned to the plaintiff's solicitors.

I shall now consider whether the defendant received the A.R. registered letter that the deposit had been paid by the plaintiff.

The defendant stated in his affidavit (encl. 20 para. 5.4) that he **did** not receive any such letter. The plaintiff produced a letter written by New Bob, the date of which is handwritten, is not very clear, but appears to be 26 April 1989. This letter, addressed to the defendant is rather peculiar. The main body of the letter sought to inform the defendant that there was a buyer who had offered to purchase the apartment at RM300,000. However, below it there is a "P.S." saying that the purchaser had agreed to purchase the apartment at RM310,000. The typewritten letter makes no mention of the payment of 10% deposit. However, there is a handwritten note as follows:

> 26 April 1989 date option was exercised whereby we received RM31,000 from purchaser Yew Ah Bah.

It is not known who wrote this note. It is not known when it was written. It clearly could not have been written on 26 April 1989, the date the letter was typed, because it was written in past tense. Therefore it is not known whether the original copy which was sent to the defendant, if it was sent, has that note or not.

One point to note here is that even if that letter is a notice pursuant to Clause 7 of the option, then it appears that notice was given **before** the contract was entered between the plaintiff and New Bob, because by para 5 of the statement of claim, the plaintiff said he entered into a contract with New Bob only on 29 April 1989. Furthermore, the wording of the note is not in the form of a notice to the defendant. It is a note simplicater.

However, it is premature for me to say whether New Bob had given a notice pursuant to Clause 7 or not, at this stage. Suffice for me to say that is an issue to be tried.

I have touched on (b) earlier and I shall not repeat.

As regards (c), Clause 2 clearly states that the apartment was to be sold with existing tenancy. However, the draft sale and purchase agreement prepared by the solicitors for the plaintiffs states that the sale was "free from encumbrances and with vacant possession." This is clearly contrary to the terms of the option. It was argued that the agreement was only in draft form and the defendant could amend it. But, the point is that it was drafted by solicitors for the plaintiff. Definitely the plaintiff's solicitors would have included the terms which were agreed by the parties, or at least, as understood by the plaintiff. If New Bob had agreed with the plaintiff to sell the apartment "free from all encumbrances and with vacant possession," then New Bob had acted outside its authority. If the New Bob had agreed to sell it to the plaintiff with existing tenancy but the plaintiff had agreed to purchase "free from all encumbrances and with vacant possession", then, I do not think, a contract had been formed, because the term that had not been agreed upon is a very material term of the contract.

The other point raised by learned Counsel for the defendant is non-disclosure of material facts. It is trite law that in an *ex parte* application for an injunction, the applicant must give a full, frank and honest disclosure of all material facts. The main argument raised here is that the draft sale and purchase agreement was not exhibited when the plaintiff applied for the *ex parte* order. A copy of the option was enclosed. It was argued that as a result of the failure, the Court was not in a position to see the difference between the terms of agreement and the terms of the option, in particular with regard to vacant possession. I think there is merit in this argument too.

Learned Counsel for the defendant argued that the plaintiff was guilty of delay in applying for the interim injunction because he did so only after 4½ months after filing the writ. I think there is no merit in this argument.

Lastly, it was argued by learned Counsel for the defendant that, in this case, damages would be an adequate remedy. It should be noted that the plaintiff when applying for the interim injunction did not say what he had purchased the apartment for. However, in an affidavit sworn by him subsequent to the application by the defendant to dissolve the injunction, he said that he wanted to move his family into the apartment. I wonder how he is going to do so as the terms of the option is clear that the sale was to be with existing tenancy.

In the circumstances, I am of the view that damages would be an adequate remedy if the plaintiff were to succeed in his action. The defendant offered to provide a bank guarantee of RM140,000 (being the difference between the purchase price of RM310,000 and the current market value of RM450,000) as security until the final disposal of the suit. In the circumstances of this case, I think it is a reasonable offer.

For the reasons stated above, I made an order in terms of prayers (a) and (b) of the summons in chambers (encl. 21). I also directed that the defendant deposit a sum of RM140,000 in a fixed deposit account bearing interest at a bank to be agreed by both parties to be jointly operated by solicitors for both parties.

Also found at [1992] 2 CLJ 896